Case Comment

Carnegie-Mellon University v. Cohill: Pendent Claim Remand as a Logical Extension of Pendent Jurisdiction

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I. INTRODUCTION

In *Carnegie-Mellon University v. Cohill*,[2] the United States Supreme Court in a five-to-three decision resolved a split among the Courts of Appeals[3] and held that federal district courts can remand a removed case containing pendent claims[4] to state court after concluding that it would be inappropriate to retain jurisdiction.[5] The Court inferred this discretion to remand from the discretion to manage pendent claims granted the lower federal courts.[6] This freedom allows the courts to administer state law claims to best serve the "principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine."[7]

Justice White's dissenting opinion[8] argued that claims could only be remanded

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1. TERENCE, ANDRIA, Act V, Scene 4. Translation: "you are hunting for a knot in a bulrush"—in other words, looking for a difficulty where none exists.

2. 108 S. Ct. 614 (1988).

3. Some circuits have held that district courts are barred from remanding a properly removed case for reasons not stated in the removal statute. *See, e.g.*, Cook v. Weber, 698 F.2d 907, 909 (7th Cir. 1983) ("remand of removed cases must be based on specific statutory authority"); Sheet Metal Workers Int'l Ass'n v. Seay, 696 F.2d 780, 782 (10th Cir. 1983) (mandamus relief is proper because the remand order was issued on grounds unauthorized by the removal statute); Levy v. Weissman, 671 F.2d 766, 769 (3d Cir. 1982) (same holding); Ryan v. State Bd. of Elections, 661 F.2d 1130, 1134 (7th Cir. 1981) (same holding).

Other circuits have held that pendent jurisdiction provides legitimate authority on which to base a decision to remand. *See, e.g.*, *In re* Romulus Community Schools, 729 F.2d 431, 440 (6th Cir. 1984) (upholding remand when "judicial economy and the presentation of unresolved issues of state law strongly support[ed] the district court's decision to remand"); Fox v. Custis, 712 F.2d 84, 89–90 & n.4 (4th Cir. 1983) (determining that the court in its discretion could remand a properly removed pendent claim); Hofbauer v. Northwestern Nat'l Bank, 700 F.2d 1197, 1207 (8th Cir. 1983) (same holding); Naylor v. Case & McGrath, Inc., 585 F.2d 557, 561–63 (2d Cir. 1978) (when state law is unsettled, district court should refuse jurisdiction and remand state law claims to state court, even after voluntary dismissal of the federal claims).

The Fifth Circuit was somewhat confused on the issue prior to *Cohill*. The court in IMFC Professional Servs. of Fla., Inc. v. Latin Am. Home Health, Inc., 676 F.2d 152, 160 (5th Cir. 1982), reversed the course of prior decisions like *In re* Greyhound Lines, Inc., 598 F.2d 883 (5th Cir. 1979), and allowed nonstatutory remand for pendent claims. However, a later decision, Boelens v. Redman Homes, Inc., 759 F.2d 504, 507 & n.2 (5th Cir. 1985), cited *Greyhound* with approval.

4. This Comment will use the term "pendent" jurisdiction to encompass both pendent and ancillary jurisdiction. See *infra* text accompanying notes 31–36.

5. *Cohill*, 108 S. Ct. at 622. While *Cohill* dealt with administering pendent claims after the federal law claim was deleted from the complaint, other possibilities might make it inappropriate for the federal court to hear pendent claims. *See infra* note 162 and accompanying text.

Congress expressly accepted the Court's decision in *Cohill* in the legislative history to the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642 (1988). *See infra* note 56 and accompanying text. While Congress has acquiesced in the availability of remand after the disposition of all federal claims in the case leaves only pendent claims, it is unclear whether other circumstances making it inappropriate for the federal court to hear the pendent claims justify the remand of those claims. This Comment contends that whenever it is unacceptable for the federal court to hear pendent claims, the district court judge should be free to remand them at his discretion.

6. *Cohill*, 108 S. Ct. at 619.

7. *Id.* at 622.

8. *Id.* at 622–26 (White, J., joined by Rehnquist, C.J., and Scalia, J., dissenting).

for statutory reasons. Because the remand statutes[9] do not apply to pendent claim remand, the majority granted essentially unlimited power to remand pendent claims.[10]

This Comment justifies pendent claim remand as an authorized and beneficial technique for district court judges to dispose of pendent claims. Section A of Part II presents the procedural history of *Cohill* and the basic situation in which the option of remanding pendent claims arises. Section B provides a concise overview of the pendent jurisdiction doctrine. The discussion in Section A of Part III examines the remand statutes as possible authority for the district courts to remand pendent claims following removal. However, Section B determines that statutory authority is not required. Although the remand statutes do not provide any basis for the power to remand, Section C concludes that they also do not limit that power. The discussion in Part IV finds that the pendent jurisdiction doctrine itself justifies the courts' latitude to remand and discusses two major issues concerning pendent claim remand—time bars on pendent claims (Section A) and forum manipulation by the plaintiff (Section B). Part V examines the lack of meaningful distinctions between remand and dismissal of pendent claims. Conclusions are set forth in Part VI.

II. A Framework for Pendent Claim Remand

A. *Procedural History of* Carnegie-Mellon University v. Cohill

Husband and wife William and Carrie Boyle (plaintiffs) commenced the action by filing a complaint against his former employer Carnegie-Mellon University and former supervisor (defendants) in a Pennsylvania state court. Plaintiffs alleged a federal age discrimination claim[11] and a number of state law claims[12] as a result of the husband's discharge by defendants.

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9. Two statutes provide for general remand after removal. The first provision states:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1441(c) (1982).

> Before its modification in 1988, the second remand provision, 28 U.S.C. § 1447(c) (1982), stated:
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> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

As a result of the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4670 (1988), § 1447(c) now reads:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

10. *Cohill*, 108 S. Ct. at 624 (White, J., dissenting).

11. Age Discrimination in Employment Act, 29 U.S.C. § 626(c)(1) (1982).

12. Such claims charged defendants with violation of state age discrimination laws, wrongful discharge in tort, wrongful discharge as breach of contract, intentional infliction of emotional distress, defamation, and misrepresentation. *Cohill*, 108 S. Ct. at 616.

Defendants removed the case to the United States District Court for the Western District of Pennsylvania. The removal was based on 28 U.S.C. section 1441(a), which allows the removal of cases in "which the district courts have original jurisdiction."[13] The case fell within the original jurisdiction of the district court because it consisted of a federal question claim, with the state law claims pendent to this federal law claim.

Six months later, the plaintiffs filed a motion for leave to amend the complaint to delete the federal age discrimination claim. The plaintiffs felt that this claim was not tenable and moved to remand the state claims to state court.[14] They noted that the amendment would eliminate their sole federal law claim, which had provided the basis for removal, and contended that remand was appropriate in these circumstances.[15] The motion to amend was granted and the district court remanded the pendent claims to the state court.[16]

Defendants filed a petition for writ of mandamus with the United States Court of Appeals for the Third Circuit. A divided merits panel granted the petition and held that the district court could not remand a removed case without specific statutory authorization.[17] The court of appeals granted plaintiffs' petition for rehearing en banc and vacated the panel opinions and writ of mandamus.[18] Since the court divided evenly on the question of the district court's authority to remand the pendent claims, the court denied the application for a writ of mandamus[19] and thus allowed the remand of plaintiffs' case. The Supreme Court granted defendants' petition for a writ of certiorari,[20] and affirmed the decision allowing the remand.[21]

B. *Pendent Jurisdiction Doctrine*

The doctrine of pendent jurisdiction allows federal courts to hear state law claims brought jointly with a federal claim in federal court or in a case removed to federal court, even though the state law claims could not have been brought separately in federal court because by themselves they do not have an independent basis of federal jurisdiction.[22] The state law claims must be closely related to the action which is within the court's statutory jurisdiction. In *United Mine Workers v. Gibbs*,[23] the Supreme Court fashioned a two-prong test for pendent jurisdiction. First, "power" exists to hear the state claim brought with the federal claim if both claims derive from a "common nucleus of operative fact" and the claims are such that

13. 28 U.S.C. § 1441(a) (1982).
14. *Cohill*, 108 S. Ct. at 616.
15. *Id.*
16. Boyle v. Carnegie-Mellon Univ., 648 F. Supp. 1318, 1321 (W.D. Pa. 1985).
17. Carnegie-Mellon Univ. v. Cohill, 41 Fair Empl. Prac. Cas. (BNA) 1046, 1051 (3d Cir. 1986).
18. Carnegie-Mellon Univ. v. Cohill, 41 Fair Empl. Prac. Cas. (BNA) 1888 (3d Cir. 1986).
19. Carnegie-Mellon Univ. v. Cohill, No. 85-3619, slip op. (3d Cir. Nov. 24, 1986) (en banc).
20. Carnegie-Mellon Univ. v. Cohill, 107 S. Ct. 1283 (1987).
21. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988).
22. *See* Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34; Miller, *Ancillary and Pendent Jurisdiction*, 26 S. TEX. L.J. 1 (1985); Teruya, *Ancillary and Pendent Jurisdiction of Federal Courts*, 31 FED. B. NEWS & J. 254 (1984); Note, *Problems of Judicial Power and Discretion in Federal Pendent Jurisdiction Cases*, 7 WM. MITCHELL L. REV. 689 (1981).
23. 383 U.S. 715, 725–27 (1966).

plaintiff "would ordinarily be expected to try them all in one judicial proceeding."[24] However, "[t]hat power need not be exercised in every case. . . . Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims. . . ."[25] *Gibbs* instructs the court to dismiss the claims without prejudice.[26] An intermediate part of the test added after *Gibbs* requires the court to determine whether the exercise of jurisdiction would violate a particular federal policy or whether it is an attempt by plaintiff to manufacture federal jurisdiction when it is otherwise foreclosed by statute.[27]

Pendent jurisdiction was created to co-exist with the Federal Rules of Civil Procedure to offer "the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[28] Together they enable plaintiffs who can claim federal question jurisdiction to choose between a federal or a state court for their entire case.[29] The theory is that once the main federal claim is in federal court, that court can more effectively adjudicate the pendent claims since otherwise the pendent claims would have to be heard as a completely independent state action, requiring a repetitious presentation of evidence common to all the claims.[30]

While *Cohill* only dealt with the remand of pendent claims, the case is most likely applicable to claims with an ancillary jurisdictional basis. "Both pendent and ancillary jurisdiction are judicial doctrines that permit a federal court to exercise jurisdiction over a party or claim normally not within the scope of federal judicial power."[31] Pendent jurisdiction "concerns the resolution of a plaintiff's federal- and state-law claims against a single defendant in one action."[32] Ancillary jurisdiction, on the other hand, "typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."[33] Ancillary jurisdiction often arises in the context of counterclaims, cross-claims, third-party claims, and interpleader.[34]

However, "[j]udges and lawyers often do not sharply distinguish between ancillary and pendent jurisdiction," and the two doctrines had been "moving toward

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24. *Id.* at 725.

25. *Id.* at 726.

26. *Id.* at 726–27.

27. Ambromovage v. United Mine Workers, 726 F.2d 972, 989–90 (3d Cir. 1984). *See infra* notes 37, 80.

28. United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966).

29. For diversity jurisdiction, an independent basis for jurisdiction for state law claims is not required. State law claims in such a case would have an independent basis for jurisdiction in federal court under 28 U.S.C. § 1332 (1982) because of the diversity of parties. The amount in controversy required in federal courts for diversity actions of course must be met for the plaintiff to have the option of initiating the action in federal court.

30. Miller, *supra* note 22, at 3.

31. Comment, *Federal Common Law Power to Remand a Properly Removed Case*, 136 U. PA. L. REV. 583, 584 n.9 (1987).

32. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978).

33. *Id.* at 376.

34. *See* Miller, *supra* note 22, at 5. For example, A sues B in federal court. Then B counterclaims with a compulsory counterclaim arising from the same transaction or occurrence as A's claim, but no subject matter jurisdiction over the counterclaim exists. Ancillary jurisdiction provides the necessary jurisdiction for the federal court to hear the state law counterclaim. *Id.*

each other" and were recently "coalesced" by the Supreme Court.[35] The Court has deemed that "there is little profit in attempting to decide . . . whether there are any 'principled' differences between pendent and ancillary jurisdiction."[36]

A key issue when dealing with pendent or ancillary claim remand is whether such a claim validly exists to be remanded.[37] If there is pendent or ancillary jurisdiction over the claim, the federal district judge needs to decide whether to exercise jurisdiction, dismiss, or remand the claim.

III. The Role of the Remand Statutes for Pendent Claim Remand

A. *The Applicability of the Remand Statutes*

Removal of cases to federal court is governed by 28 U.S.C. sections 1441-1452.[38] Section 1441[39] is the general removal statute and allows defendants a

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35. *See* Aldinger v. Howard, 427 U.S. 1, 13 (1976); Miller, *supra* note 22, at 2. *See also* Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935 (1982); Note, *Developing a Unified Approach to Pendent and Ancillary Jurisdiction: A* Merger *Made in Heaven*, 11 VT. L. REV. 505 (1986).

36. *Aldinger*, 427 U.S. at 13.

37. One problem is pendent party jurisdiction, which concerns whether additional parties may be brought in on a pendent or ancillary claim. It is an attempt to join a non-Article III claim against one party with a jurisdictionally sufficient claim against another party. Miller, *supra* note 22, at 12. For example, in Aldinger v. Howard, 427 U.S. 1 (1976), the plaintiff filed a suit under the federal Civil Rights Statute, 42 U.S.C. § 1983 (1982), against the county commissioners and a county treasurer, and sought to name the county as a pendent party by asserting state law claims against it. But because certain governmental units are not suable under § 1983, the county could not be brought in by pendent jurisdiction under a parallel state theory. Congress expressly negated the existence of jurisdiction over a particular party, and pendent jurisdiction could not be used to circumvent it. *Id.* at 16–17.

In Lykins v. Pointer, Inc., 725 F.2d 645, 648–49 (11th Cir. 1984), the lack of diversity between the plaintiff and defendants brought in under state law claims was handled through pendent party jurisdiction. The claims were pendent to claims under the Federal Tort Claims Act (FTCA) against the United States and the Federal Aviation Administration. The court found that the FTCA did not expressly or otherwise negate the federal court's power to try this single case together in one action. This action could not have been tried in state court since the FTCA confers exclusive jurisdiction on the federal courts. However, the Supreme Court in Finley v. United States, 109 S. Ct. 2003 (1989), held that the FTCA defines jurisdiction in a manner that does not reach defendants other than the United States; as a result, pendent party jurisdiction was rejected.

Removal and remand of pendent party claims may entangle the courts with special problems, including partial remand and partial dismissal. These are beyond the scope of this Comment. *See* Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases*, 41 VAND. L. REV. 923, 975–90 (1988).

38. 28 U.S.C. §§ 1441–1452 (1982 & Supp. IV 1986), *as amended by* the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669–70 (1988).

39. 28 U.S.C. § 1441 (1982) provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
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> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

The Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669 (1988) added this sentence to the end of § 1441(a): "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."

Section 1441(a) provides the authority for removal of cases within the federal courts' original jurisdiction. Section 1441(b) merely specifies that cases not removed based on federal question jurisdiction, which are basically diversity jurisdiction cases, cannot be removed if a defendant is a citizen of the state where the action was brought.

broad power of removal.[40] The most common opportunity for removal arises when a local plaintiff sues a nonresident defendant in a state court on a claim exceeding 50,000 dollars.[41] Since the case originally could have been filed in federal court based on the parties' diversity of citizenship, the case can be removed.[42] Such removal is generally justified on the theory of protecting a nonforum defendant from prejudice in the courts of the forum state.[43] Cases based on a federal question can also be removed.[44] Federal question removal is considered to have been created "to protect federal rights . . . and to provide a forum that could more accurately interpret federal law."[45] Claims pendent to jurisdictionally sufficient claims are removable since they are within the original jurisdiction of the federal courts. The other removal provisions, sections 1442-1452, specify certain removable actions,[46] nonremovable actions,[47] and removal procedures.[48]

Defendant's removal of the case to federal court, however, is subject to two general remand statutes, 28 U.S.C. sections 1441(c) and 1447(c).[49] Either the plaintiff or the court may question the propriety of the remand under these

40. A plaintiff who institutes an action, and against whom a counterclaim is asserted that would be within federal jurisdiction, cannot remove even though he is in a defensive posture. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 106 (1941).

41. The original jurisdiction required under 28 U.S.C. § 1441 (1982) is provided by the diversity statute, 28 U.S.C. § 1332 (1982). The amount in controversy requirement for diversity cases was raised from $10,000 to $50,000 effective for any civil action commenced on or after May 18, 1989. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201, 102 Stat. 4642, 4646 (1988).

42. The removal statutes also allow for certain actions to be removed even if they could not have originally been brought in a federal court. 28 U.S.C. § 1441(c) (1982) provides for removal when "separate and independent" claims are joined with "one or more otherwise non-removable claims." Moreover, 28 U.S.C. §§ 1442–42a (1982) allow for removal of actions brought against federal officers, agencies, and members of the armed forces. Such actions are removable by officers when they assert a substantial federal defense, based on their official capacity, to a state law action brought against them in state court. Since the federal question comes in by way of defense, there is no original federal question jurisdiction under 28 U.S.C. § 1331 (1982). H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 508 (2d ed. 1987).

43. Comment, *supra* note 31, at 613.

44. *See* Fousekis & Brelsford, *Removal*, 11 LITIGATION 39 (1985); Fritsche & Osman, *In and Out of Federal Court: Removal and Remand*, 51 TEX. B.J. 85 (1988).

45. Boys Market, Inc. v. Retail Clerks Union, 398 U.S. 235, 246 n.13 (1970) (Brennan, J.).

46. Actions may also be removed when federal officers are defendants, 28 U.S.C. § 1442(a)(1) (1982), when members of the armed services are sued or prosecuted for acts stemming from that status, 28 U.S.C. § 1442a (1982), when civil rights are implicated, 28 U.S.C. § 1443 (1982), and when property interests of the United States are at issue, 28 U.S.C. § 1444 (1982).

47. *See* 28 U.S.C. § 1445 (1982). Such nonremovable actions include claims arising under the workmen's compensation laws of the state where the action is pending. In effect, these prohibitions give the plaintiff a choice between federal and state forums which the defendant cannot alter.

48. *See* 28 U.S.C. § 1446 (1982), *as amended by* the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669–70 (1988). Note that this amendment rewrote § 1446(b) to prevent removal on the basis of § 1332 jurisdiction (diversity of citizenship and alienage jurisdiction) more than one year after the commencement of the action, even if a change in parties creates complete diversity such that the case becomes removable.

49. 28 U.S.C. §§ 1441(c), 1447(c) (1982), *as amended by* the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4670 (1988). See *supra* note 9 for the text of these statutes.

An additional remand provision, to be codified at 28 U.S.C. § 1447(e), states: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4670 (1988). This remand statute is not applicable to pendent claim remand as discussed in this Comment because the basis for federal jurisdiction over the pendent claims is federal question and not diversity jurisdiction.

provisions.[50] The remand statutes must be examined to determine whether they provide authority for the remand of pendent claims.

Section 1447(c) does not provide support for the power to remand pendent claims. First, the statute allows for the court to remand if there were any defects in the removal procedure. A motion to remand must be made within thirty days after filing of the notice of removal under 28 U.S.C. section 1446(a).[51] Second, the provision requires remand "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction." Section 1447(c) was rewritten slightly in 1988.[52] Before the amendment, section 1447(c) required remand if the case was "removed improvidently and without jurisdiction." These components were simply clarified and not substantively altered as a result of the amendment.[53]

Removal in *Cohill* was proper since it was in compliance with the procedures of the removal statutes[54] and was without jurisdictional defects;[55] thus, section 1447(c) is inapplicable. Congress even made explicit the inapplicability of section 1447(c) to pendent claim remand in the legislative history of the 1988 removal procedure amendments, which stated that "[t]he amendment is written in terms of a defect in 'removal procedure' in order to avoid any implication that remand is unavailable after

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50. Herrmann, Thermtron *Revisited: When and How Federal Trial Court Remand Orders are Reviewable*, 19 ARIZ. ST. L.J. 395, 395 (1987).

51. The legislative history of the Judicial Improvements and Access of Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642 (1988), states why this waiver provision was added:

> So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn.

H.R. REP. No. 889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 6033.

52. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4670 (1988).

53. "Improvidently" generally referred to "procedural errors in the timing and wording of the removal petition" and was interpreted to be somewhat discretionary because errors in the removal petition could be waived if prompt objections were not made. Herrmann, *supra* note 50, at 404 n.47 (1987). *See also In re* Merrimack Mut. Fire Ins. Co., 587 F.2d 642, 647 n.8 (5th Cir. 1978) (removal improvident when "one of the statutory, non-jurisdictional requirements for removal has not been satisfied"). This waiver is now expressly set forth in section 1447(c) with a limit of 30 days for asserting defects.

These requirements for remand were read disjunctively, so cases could be remanded if removed either improvidently or without jurisdiction. FDIC v. Alley, 820 F.2d 1121, 1124 (10th Cir. 1987) (quoting Briscoe v. Bell, 432 U.S. 404, 413–14 n.13 (1977), which stated that "[w]here the order is based on one of the enumerated grounds, review is unavailable"). This was also clarified by the 1988 amendment by rewriting the two remand principles into two separate sentences. *See supra* note 9.

54. 28 U.S.C. §§ 1441–1452 (1982 & Supp. IV 1986), *as amended by* the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669–70 (1988).

55. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 617 (1988). Because the district court had jurisdictional power over the pendent claims under *Gibbs*, even though it had the discretion not to exercise that power and hear the pendent claims, "a remand ordered as a matter of discretion not to exercise conceded judicial power is *not* a remand predicated on a lack of jurisdiction." Steinman, *supra* note 37, at 962 (emphasis in original).

In some instances, pendent claims have been remanded under the "without jurisdiction" provision of old § 1447(c). When the federal claims in a case were claims within the exclusive subject matter jurisdiction of the federal courts, and the action was removed to federal court, the district court was without jurisdiction to hear them upon removal. The federal claims had to be dismissed because the state courts could not hear them, but pendent claims could be remanded because the action was removed "without jurisdiction" as provided in § 1447(c). Steinman, *supra* note 37, at 976. This situation is distinguishable from the remand situation in *Cohill* because all the removed claims were within the removal jurisdiction of the federal courts. *Cohill* has no impact on these cases. *Id.* In any event, this issue is no longer significant since the addition of 28 U.S.C. § 1441(e) (Supp. IV 1986), which provides that the court to which the action is removed is not precluded from hearing any claims because the state court did not have jurisdiction over those claims.

disposition of all federal questions . . . that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded."[56]

The combination of section 1447(c) with the rule governing relation back of amendments to the time of pleading[57] might seem to authorize pendent claim remand.[58] Because an amendment deleting the federal claims would relate back to the time of the pleading, no federal claims would appear on the face of the complaint at the time of removal. The removal would be lacking subject matter jurisdiction and the case would have to be remanded.[59] This interpretation, however, does not provide a basis for the power to remand since it unduly stretches section 1447(c). The principle that remand for lack of jurisdiction is mandatory[60] conflicts with the district courts' discretion to exercise jurisdiction over pendent claims.[61] The district court in *Cohill* was not "lack[ing] subject matter jurisdiction" because the court "had jurisdiction and declined to hear the case *despite* having jurisdiction."[62]

Section 1441(c)[63] also does not authorize the remand of pendent claims. The statute provides for removal of the entire case, and then allows the district judge to remand the "separate and independent" nonremovable claims. It was enacted to protect the defendant from losing the protection of federal diversity jurisdiction through the plaintiff's joinder of a nondiverse party in a "separable" claim.[64] Because pendent claims by definition arise out of a "common nucleus of operative fact,"[65] they are not "separate and independent" as required by section 1441(c).[66]

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56. H.R. REP. No. 889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 6033.

57. FED. R. CIV. P. 15(c).

58. *See* Comment, *supra* note 31, at 615 n.177.

59. *Id.*

60. Herrmann, *supra* note 50, at 404 n.47.

61. *See supra* text accompanying note 25.

62. Herrmann, *supra* note 50, at 422 (emphasis in original).

63. 28 U.S.C. § 1441(c) (1982).

64. Charles D. Bonanno Linen Serv., Inc. v. McCarthy, 708 F.2d 1, 9 (1st Cir.) (citing Barney v. Latham, 103 U.S. 205, 210 (1881)), *cert. denied*, 464 U.S. 936 (1983).

65. *See supra* text accompanying note 24.

66. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 621 (1988). In American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14 (1951), the Supreme Court held that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)." Since all the claims in *Cohill* arose from the termination of employment, plaintiffs suffered a "single wrong." *See also* Boggs v. Lewis, 863 F.2d 662, 664 (9th Cir. 1988) (claims against driver and insurance company as a result of automobile accident were "separate and independent" because the claim against the insurance company primarily involved the insurer's conduct and other events occurring after the accident); New England Concrete Pipe Corp. v. D/C Sys. of New England, Inc., 658 F.2d 867 (1st Cir. 1981); Climax Chem. Co. v. C.F. Braun & Co., 370 F.2d 616 (10th Cir. 1966), *cert. denied*, 386 U.S. 981 (1967); Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566, 580 n.17 (N.D. Cal. 1981), *aff'd in part, rev'd in part*, 731 F.2d 1423 (9th Cir. 1984); 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3724, at 368 ("It seems reasonable to conclude that claims involving common questions and stemming from the same transaction do not qualify as separate and independent claims or causes of action under the Supreme Court's formulation."). A peculiar result occurs when both pendent jurisdiction and the "separate and independent" provision cannot be used to provide jurisdiction for certain state law claims in federal court. For example, if pendent party jurisdiction is prohibited for the state claims because Congress has negated such jurisdiction and the state law claims are too closely related to the jurisdictionally sufficient claims in the case to be "separate and independent," the claims are restricted to state court. "What sense does it make, after all, to have a *tertium quid* of certain state claims—those too distant to be pendent, too close to be 'separate and independent'—that alone, in an 'arising under' case, the federal court would have no statutory power to hear?" *Bonanno Linen*, 708 F.2d at 9. This court concluded:

> In sum, *Aldinger* closes the door to these 'pendent party' claims, and § 1441(c) fails to reopen it. We have what the commentators consider an anomalous 'middle' category of parties left behind in state court. But we see no

This provision cannot rationally be construed to authorize pendent claim remand.[67]

Nevertheless, section 1441(c) does provide a sensible basis for the belief that if Congress would have enacted statutes dealing with pendent claim remand, it would have allowed such remand.[68] Federal jurisdiction over state law claims under section 1441(c), like pendent jurisdiction, is another example of a district court exercising jurisdiction normally not within its judicial power.[69] Section 1441(c) illustrates an instance in which Congress was willing to allow federal courts to have discretion over certain state law claims, even though those claims are not generally within the "judicial power" of the federal courts and are "separate and independent" from the jurisdictionally sufficient claims in the case. Consequently, discretion to remand pendent claims is reasonable, particularly since the courts already have broad discretion to deal with pendent claims.

B. *The Immateriality of Statutory Authority*

While the validity of pendent claim remand would be easily settled if the remand statutes provided a logical basis for the discretion to remand, statutory authority is simply not required for this type of remand. The Supreme Court, not Congress, has developed the doctrine of pendent jurisdiction and the principles of how it is to be

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serious harm arising out of this interpretation of the law. To interpret the words 'separate and independent' more liberally here would depart from *Finn*, suggest a different interpretation of these same words in 'arising under' cases, and thereby proliferate standards in an area already too complex. Any anomaly arising out of the much-criticized § 1441(c) can be resolved through legislation.

Id. at 10–11. As a result, the "arising under" and pendent claims were removed to federal court, but the other state claim defendants had to be left behind in state court. *Id.* at 11. As for correcting this anomaly through legislation, the court cites a proposal by the American Law Institute which would require the district courts to remand all claims not within their pendent jurisdiction, thus eliminating the use of § 1441(c) and discretionary remand of claims not within its original jurisdiction in these federal question cases. *Id.* (citing *ALI Study of the Division of Jurisdiction Between State and Federal Courts*, 29, 212–13 (1969)).

While the interplay between general pendent jurisdiction and "separate and independent" claims involving the same parties is unclear, some commentators have suggested that when a defendant removes an "arising under" case, "any state claims involved are either sufficiently closely related to the federal claims to be considered 'pendent' (and thus removable under § 1441(b)), or they are sufficiently unrelated to be considered 'separate and independent' (and thus removable under § 1441(c))." *Id.* at 9. *See, e.g.*, J. MOORE & B. RINGLE, 1A MOORE'S FEDERAL PRACTICE ¶ 0.163[4.-5], at 339 & n.33 (2d ed. 1987) ("if a state suit contains at least one claim over which a federal court would have original federal question jurisdiction and any other claims are properly joined, the entire suit is removable under either § 1441(a) or (b) *or* § 1441(c)" (emphasis in original)). If this is correct, then no "middle category" of cases would exist in which the claims involved would be neither closely related enough for pendent jurisdiction nor "separate and independent" enough for jurisdiction under § 1441(c). The federal courts would have statutory power to hear all the claims in an "arising under" case, absent some difficulty with pendent party jurisdiction as discussed above.

67. *But see* Herrmann, *supra* note 50, at 422. Prior to the Supreme Court's decision in *Cohill*, Herrmann argued that § 1441(c) "could reasonably be construed" by the Court to permit such remand: "If state claims can be remanded so long as they are not intertwined with federal claims, remand arguably should also be permitted when the federal claims are *dismissed* and the state claims thus left 'separate and independent.'" *Id.* (emphasis in original).

68. Comment, *supra* note 31, at 623. *See also* Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 621 (1988). The majority in *Cohill* contended that § 1441(c) "actually supports such authority," but the provision does not provide actual statutory authority.

69. Comment, *supra* note 31, at 585 n.12. These claims cannot be classified as either pendent or ancillary because they are not closely related to the claim providing jurisdiction, see *supra* text accompanying notes 22–34, and jurisdiction over them is provided by statute, not by judicial doctrine. However, they are a third instance in which a federal court may decide state law claims arising between nondiverse parties.

exercised.[70] Thus, the judge who looks for statutory direction on the exercise of pendent jurisdiction will "look in vain"[71] because "Congress has seen fit to entrust the development of this area of the law to the courts."[72] For example, while the district courts are supposed to dismiss the pendent state claims if the federal claims are dismissed before trial,[73] no statute authorizes dismissal of a case properly before the court.[74]

It can hardly be a "fundamental constitutional principle that the jurisdiction of the inferior federal courts is dependent on specific statutory authorization"[75] when the pendent jurisdiction doctrine itself has no statutory authorization.[76] It is ludicrous to expect Congress to address the remand of pendent claims by statute when the pendent jurisdiction doctrine itself is completely nonstatutory and is based on the foundation provided in *Gibbs*.

Nevertheless, Congress has infrequently provided for pendent jurisdiction by statute in certain cases. For example, in the patent and intellectual property areas, "[t]he district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws."[77] However, Congress has never attempted to define general pendent jurisdiction statutorily. It only applies the doctrine in specific instances to make sure that such jurisdiction is

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70. *See, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); Aldinger v. Howard, 427 U.S. 1 (1976); Zahn v. International Paper Co., 414 U.S. 291 (1973); Rosado v. Wyman, 397 U.S. 397 (1970); Snyder v. Harris, 394 U.S. 332 (1969).

71. Carnegie-Mellon Univ. v. Cohill, 41 Fair Empl. Prac. Cas. (BNA) 1046, 1052 (3d Cir. 1986) (Stapleton, J., dissenting), *granting mandamus in* Boyle v. Carnegie-Mellon Univ., 648 F. Supp. 1318 (W.D. Pa. 1985), *vacated and reh'g granted*, 41 Fair Empl. Prac. Cas. (BNA) 1888 (3d Cir. 1986), *aff'd by an equally divided court*, No. 85-3619, slip op. (3d Cir. Nov. 24, 1986) (en banc), *aff'd*, 108 S. Ct. 614 (1988).

72. *Id. See also* Aldinger v. Howard, 427 U.S. 1 (1976). Inquiry into the statutory grant of jurisdiction is not required because "Congress ha[s] not addressed itself by statute to this matter" and has "left the way open for the Court to fashion its own rules under Art. III." *Id.* at 13, 15.

73. *Gibbs*, 383 U.S. at 726.

74. *Cohill*, 41 Fair Empl. Prac. Cas. (BNA) at 1052 (Stapleton, J., dissenting).

Based on the principle of Congress' silence with respect to the ability of the district courts to dismiss pendent claims, the majority in *Cohill* did argue that:

> the removal statute does not address specifically *any* aspect of a district court's power to dispose of pendent state-law claims after removal: just as the statute makes no reference to a district court's power to remand pendent claims, so too the statute makes no reference to a district court's power to dismiss them. Yet petitioners concede, as they must, that a federal court has discretion to dismiss a removed case involving pendent claims. Given that Congress's silence in the removal statute does not negate the power to dismiss such cases, that silence cannot sensibly be read to negate the power to remand them.

Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 620–21 (1988) (emphasis in original). However, this justification for pendent claim remand is flawed because Rule 81(c) of the Federal Rules of Civil Procedure makes the Rules applicable to removed actions and the Rules authorize dismissals on a broad range of grounds. Moreover, courts historically have had an inherent power to dismiss cases for discretionary reasons. Steinman, *supra* note 37, at 958. Thus, "any special congressional grant of the power to dismiss a removed case would have been redundant, and hence superfluous." *Id.* While "a congressional silence that does not negate the power to dismiss *can* very sensibly be read to negate the power to remand," *id.* at 959 (emphasis added), this Comment demonstrates that other considerations justify the power to remand pendent claims.

75. *Cohill*, 41 Fair Empl. Prac. Cas. (BNA) at 1051.

76. *See id.* at 1052 (Stapleton, J., dissenting) ("Given the absence of statutory law relating to the exercise of pendent jurisdiction generally, it is not surprising that Congress has not expressly addressed the subject of remand in the context of a case in which an exercise of pendent jurisdiction has been found to be no longer appropriate.").

77. 28 U.S.C. § 1338(b) (1982).

available in the district courts, especially when the federal jurisdiction providing the pendent jurisdiction is exclusive.[78]

C. *The Nonpreclusive Effect of the Remand Statutes*

Although the remand statutes provide no authority for pendent claim remand, the statutes must be further examined to ascertain whether they limit the ability to remand pendent claims.[79] Jurisdictional power over pendent claims is not boundless but is constrained by statutes.[80] Before a court can conclude whether jurisdiction exists over a state law claim or whether a claim can be manipulated in a certain way, it must determine that "Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."[81]

The *Cohill* dissent contended that since Congress chose specifically to provide for two situations when courts are to remand cases,[82] the courts cannot remand in other circumstances.[83] Congress would never have enacted the remand statutes if it thought that the courts had a broad power to remand. By finding a third category of cases that may be remanded, the majority rendered the remand statutes "wholly superfluous."[84]

Although Congress has only dealt with the remand of two types of cases, it has not indicated that it prohibits remand of pendent claims once a federal court has decided not to entertain them, and on the contrary has approved of the procedure.[85] The idea that the remand statutes limit pendent claim remand is an "unduly rigid reading"[86] of the statutes which do not even discuss pendent claims. As the majority in *Cohill* pointed out, the statutes do not conflict with pendent claim remand.[87] The statutes merely provide that in one case, claims *must* be remanded,[88] and in another, claims *may* be remanded in the court's discretion.[89] The provisions need not be read to be exclusive of all potential remand power.[90]

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78. *See* 28 U.S.C. § 1338 (1982) (Historical and Revision Notes). Subsection (b) is intended to avoid "piecemeal" litigation by permitting enforcement in a single civil action in the district court. "While this is the rule under Federal decisions, this section would enact it as statutory authority." *Id.*

79. *See* Comment, *supra* note 31, at 595.

80. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 (1978). The power over state law claims is also limited by the provisions in Article III of the Constitution.

In *Owen*, 437 U.S. at 377, the congressionally mandated complete diversity requirement of 28 U.S.C. § 1332(a)(1) (1982), as interpreted by Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), prevented the district court from having jurisdiction over the plaintiff's state law claim against a nondiverse impleaded defendant.

81. Aldinger v. Howard, 427 U.S. 1, 18 (1976). *See* Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103, 167–68 (1983).

82. 28 U.S.C. §§ 1441(c), 1447(c) (1982), *as amended by* the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4670 (1988).

83. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 624 (1988) (White, J., dissenting).

84. *Id.*

85. Fox v. Custis, 712 F.2d 84, 89 n.4 (4th Cir. 1983). See *supra* note 56 and accompanying text for Congress' recent acceptance of pendent claim remand.

86. *Id.*

87. *Cohill*, 108 S. Ct. at 621 n.11.

88. *See* 28 U.S.C. § 1447(c) (1982), *as amended by* the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4670 (1988).

89. *See* 28 U.S.C. § 1441(c) (1982).

90. *See* Comment, *supra* note 31, at 604 (determining whether any statute limits discretion over pendent claims

Besides the two general remand statutes, 28 U.S.C. section 1452 provides for removal and remand of claims related to bankruptcy cases.[91] Since Congress addressed the remand of claims in this specific area, it could have provided for statutory pendent claim remand if it wanted the district courts to have that power. However, as discussed previously,[92] a general pendent claim remand statute would be unexpected and is unnecessary.

One could also argue that the expression of one thing in a statute is the exclusion of another, *expressio unius, exclusio alterius*,[93] but again, Congress would have had no reason to address pendent claim remand in the remand statutes. Also noteworthy is that the removal statutes are strictly construed against removal to comply with congressional intent "to limit the right of removal out of concern for state courts' independent jurisdiction."[94] This policy objective is best served by allowing pendent claim remand, since by remanding the claims the district courts will be allowing the state courts to hear them.[95]

Nevertheless, the dissent insisted that the majority's holding could not be reconciled with *Thermtron Products, Inc. v. Hermansdorfer*.[96] In *Thermtron*, the Court determined that a diversity case could not be remanded for the reason that it would be more quickly adjudicated in state court. Such remand was not specifically authorized by statute.[97] The problem with *Thermtron* for pendent claim remand is that

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"does not assume that a jurisdictional statute restrictively *defines* all permissible exercises of judicial power" (emphasis in original)).

It has been argued that because the removal and remand statutes were passed in substantially their present form in 1948 and the modern pendent jurisdiction was not articulated until 1966 in *Gibbs*, Congress should not be expected to address this matter statutorily. Note, *Recognizing the Power to Remand: A Move Back to Fairness*, 18 STETSON L. REV. 191, 204–05 (1988). While this is partially correct because it recognizes that pendent jurisdiction and nonfederal claims have been left to the courts to handle, *see supra* notes 70–78 and accompanying text, it fails to recognize that Congress could certainly have adopted other removal provisions in the years since *Gibbs* and that pendent jurisdiction has existed for a long time before *Gibbs* articulated the current test. *See* Hurn v. Oursler, 289 U.S. 238 (1933) (earlier pendent jurisdiction test).

91. *See* Gibson, *Removal of Claims Related to Bankruptcy Cases: What is a "Claim or Cause of Action"?*, 34 UCLA L. REV. 1 (1986). 28 U.S.C. § 1452 (Supp. IV 1986) provides:

> (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.
>
> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision not to remand, is not reviewable by appeal or otherwise.

92. *See supra* notes 70–78 and accompanying text.

93. *See* United States v. Arredondo, 31 U.S. (6 Pet.) 691, 741 (1832); Arthur v. Cumming, 91 U.S. 362, 364 (1875).

94. Cook v. Weber, 698 F.2d 907, 909 (7th Cir. 1983) (citing Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100, 108-09 (1941)). One court noted that "almost all Supreme Court decisions expounding the law of removal have been in the context of holding that removal was unwarranted." Illinois v. Kerr-McGee Chem. Corp., 677 F.2d 571, 576 (7th Cir.), *cert. denied*, 459 U.S. 1049 (1982).

95. The court in *Cook* argued that in order to effectuate congressional policy on removal, the basis for remanding a removed case must be grounded on federal statutory authority. *Cook*, 698 F.2d at 909. However, this seems contrary to the congressional policy, because demanding strict compliance with the removal statutes and refusing to allow district courts to remand pendent claims forces the district courts either to retain jurisdiction over the pendent claims or to dismiss them, thus not really protecting state courts' independent jurisdiction.

96. 423 U.S. 336 (1976).

97. *See id.* at 345, 351.

the case seems to imply that the district courts are limited in remanding cases for statutory reasons.[98]

However, the aggressive assertions against nonstatutory remand in *Thermtron* were induced by the "clearly impermissible"[99] nature of the remand.[100] The case did not hold that discretion is prohibited from the remand process.[101] A careful reading of *Thermtron* indicates that the case is distinguishable from the remand of pendent claims.

Thermtron held that the district court judge exceeded his authority in remanding on "grounds that he had no authority to consider."[102] But in determining whether to remand pendent claims, a judge can consider grounds of judicial economy, convenience, and fairness because he is authorized to do so to determine whether to dismiss pendent claims.[103] While a "properly removed action may no more be remanded because the district court considers itself too busy" than it may be dismissed for such a reason[104]—for example the diversity case in *Thermtron* which the federal court was required to hear[105]—a case might be remanded when the court considers valid reasons which authorize it to dismiss. As the Court in *Cohill* stated: "The implication . . . is that an entirely different situation is presented when the district court has clear power to decline to exercise jurisdiction."[106]

In *Thermtron*, the Court was not convinced that Congress intended to extend "carte blanche authority to the district courts to revise the federal statutes governing removal"[107] because the judge attempted to remand for an unorthodox reason. In allowing pendent claim remand, however, a court is hardly being granted "carte blanche": it is limited to remanding pendent claims, with its decisions reversible by an abuse of discretion standard.[108] The *Cohill* dissent complained that there is no limit to the power to remand because it is based on the "amorphous reasons of 'economy, convenience, fairness, and comity' that may seem justifiable to the majority but that have not been recognized by Congress."[109] But the courts already possess the same discretion to dismiss pendent claims, and Congress has not been apprehensive about discretion based on these "amorphous reasons" since it has not attempted to

98. Boyle v. Carnegie-Mellon Univ., 648 F. Supp. 1318, 1321 (W.D. Pa. 1985), *mandamus granted sub nom.* Carnegie-Mellon Univ. v. Cohill, 41 Fair Empl. Prac. Cas. (BNA) 1046 (3d Cir. 1986), *vacated and reh'g granted*, 41 Fair Empl. Prac. Cas. (BNA) 1888 (3d Cir. 1986), *aff'd by an equally divided court*, No. 85-3619, slip op. (3d Cir. Nov. 24, 1986) (en banc), *aff'd*, 108 S. Ct. 614 (1988).

99. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 621 (1988).

100. *In re* Romulus Community Schools, 729 F.2d 431, 436 (6th Cir. 1984). *See* Comment, *supra* note 31, at 601, 604 (discretion is "not an element of any congressional grant of jurisdiction, but a function of the need for case-by-case refinement of broad statutory provisions" and *Thermtron* is therefore limited to its facts (citing Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 574 (1987))).

101. IMFC Professional Servs. of Fla., Inc. v. Latin Am. Home Health, Inc., 676 F.2d 152, 159 (5th Cir. 1982).

102. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351 (1976).

103. *See supra* text accompanying note 25.

104. *Thermtron*, 423 U.S. at 344.

105. 28 U.S.C. § 1332(a) (1982) (the diversity statute provides for mandatory jurisdiction).

106. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 622 (1988).

107. *Thermtron*, 423 U.S. at 351.

108. *See* D. CRUMP, W. DORSANEO, O. CHASE & R. PERSCHBACHER, CASES AND MATERIALS ON CIVIL PROCEDURE 816 (1987) ("A discretionary decision will not be reversed unless the appellate court is convinced that the trial court was clearly wrong.").

109. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 624 (1988) (White, J., dissenting).

invalidate pendent jurisdiction. The recognition of a discretionary power to remand pendent claims would not "create an unwieldly situation with no effective boundaries to control the exercise of that discretion,"[110] when district courts already have the same discretion to dismiss pendent claims. Furthermore, the separate remand provision for bankruptcy cases[111] demonstrates Congress' lack of concern over remand provisions bestowing extraordinary discretion upon district judges. It allows remand "on any equitable ground," and the remand order or decision not to remand is not reviewable. The "equitable grounds" that district courts can consider[112] are similar to the *Gibbs* considerations.

Thermtron is also distinguishable from pendent claim remand because in the latter instance there is no right to have remanded claims heard in a federal forum. Unlike the *Thermtron* situation in which Congress established a right to have a claim heard by a federal court and the district court judge attempted to deny that statutory right,[113] parties have no right to have pendent claims adjudicated by a federal court.[114] Pendent claims are constantly teetering on the precipice of federal jurisdiction because the issue of jurisdiction "remains open throughout the litigation."[115] While remand somewhat "frustrate[s] Congress' purpose in providing a right of removal"[116] by returning the claims to state court, it does not frustrate any right to have pendent claims adjudicated in a federal forum following removal.[117] Congress never intended for the courts to treat pendent claims differently after removal than if originally brought in federal court[118] and only meant to protect from remand cases that come under federal *statutory* jurisdiction.[119]

One might respond that the Supreme Court has repeatedly refused to allow remands based upon events subsequent to removal—including the amending of the

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110. Brief for Petitioners at 17, Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988) (No. 86-1021).

111. 28 U.S.C. § 1452(b) (Supp. IV 1986). *See supra* note 91 for the text of this provision.

112. District courts can ponder the following considerations in deciding whether to remand bankruptcy cases: (1) forum non conveniens; (2) that the entire action of a bifurcated matter should be tried in the same court; (3) that a state court is better able to resolve state law questions; (4) expertise of a particular court; (5) judicial economy; (6) prejudice to the involuntarily removed party; (7) comity; and (8) the lessened possibility of an inconsistent result.

Thomasson v. Amsouth Bank, N.A., 59 Bankr. 997, 1008 n.9 (N.D. Ala. 1986) (citing Browning v. Navarro, 743 F.2d 1069, 1076 n.21 (5th Cir. 1984)).

113. *See* Carnegie-Mellon Univ. v. Cohill, 41 Fair Empl. Prac. Cas. (BNA) 1046, 1053 (3d Cir. 1986) (Stapleton, J., dissenting).

114. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). *See also In re* Romulus Community Schools, 729 F.2d 431, 437 (6th Cir. 1984) ("the court had uncontroverted authority to refuse to hear the case after the federal claim was dismissed").

115. *Gibbs*, 383 U.S. at 727. The Court also stated that "recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case." *Id.*

116. *Cohill*, 41 Fair Empl. Prac. Cas. (BNA) at 1051. The court also stated that "[a] defendant who exercises that right might thereafter be subject to duplicative and costly subsequent state proceedings." *Id.*

117. *See* Comment, *supra* note 31, at 602, 619 ("Providing for removal jurisdiction indicates Congress's policy determination that defendants can choose to litigate certain cases in a federal forum," but "the duty of a federal court to exercise jurisdiction over such a case should hardly be considered 'clear and indisputable.'"). *See also id.* at 607–16.

118. *Id.* at 623.

119. *Id.* at 619. The history of pendent claims and removal jurisdiction between the Civil War and 1887 "demonstrate[s] Congress's intent not to confer on state court defendants the right to have incidental claims adjudicated by a federal court after removal." *Id.* at 607. Through additional remand statutes in 1887, "Congress demonstrated its concern that removal jurisdiction not usurp the traditional role of state courts." *Id.* at 614.

complaint, the joinder of a party, or the reduction in requested damages below the jurisdictional amount.[120] These cases are distinguishable from pendent claim remand.[121] In the latter case, the district court has determined that the state law claims should not be heard in federal court and is simply remanding the case rather than dismissing it. An amendment deleting the federal claim does not "defeat federal jurisdiction"[122] with respect to the pendent claims, although it occurs subsequent to removal, because the court is merely refusing to exercise jurisdiction over the pendent claims for judicial economy and state comity reasons. Events occurring after removal can properly affect the district court's discretionary decision of whether to exercise its jurisdiction over the pendent claims.[123] If the judge decides to dismiss pendent claims, he can instead remand the claims after assuring himself that manipulation of the forum has not occurred.[124]

Because the statutory provisions do not limit the exercise of pendent claim remand, the district courts are free to remand pendent claims if some authority can be found for that power.

IV. Justification for Pendent Claim Remand Through the Pendent Jurisdiction Doctrine

The discretion to remand pendent claims to state court following removal is proper since it is based on "clearly articulated authority."[125] While statutory authority is not required,[126] a judge cannot merely concoct discretion because he thinks it would be beneficial; courts must provide an explanation for not exercising jurisdiction which is based on the historical context of the legislative grant.[127]

A federal court's common law authority over pendent claims from *United Mine Workers v. Gibbs*[128] furnishes support for pendent claim remand. Although *Gibbs* only spoke of dismissal of pendent claims, remand was not an option for the Court since the case was originally brought in federal court.[129] Nevertheless, *Gibbs*

120. *See, e.g.*, St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 291–93 (1938) (jurisdiction not lost through plaintiff's subsequent reduction of his claim to less than the jurisdictional amount in controversy requirement); Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939) (second amended complaint should not have been considered in determining the right to remove); Phelps v. Oaks, 117 U.S. 236, 238–39 (1886) (court not ousted of jurisdiction by admitting a co-defendant, pursuant to a state statute, which destroyed diversity).

121. Lovell Mfg. v. Export-Import Bank of the United States, 843 F.2d 725, 735 (3d Cir. 1988) ("to the extent a black-letter rule ever existed, precluding a court from relying on post-removal events to determine whether to exercise pendent jurisdiction, the Supreme Court clearly did not feel bound by it in [*Cohill*]").

122. Westmoreland Hosp. Ass'n v. Blue Cross, 605 F.2d 119, 123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

123. Steinman, *supra* note 37, at 974.

124. *See infra* notes 172–88 and accompanying text.

125. IMFC Professional Servs. of Fla., Inc. v. Latin Am. Home Health, Inc., 676 F.2d 152, 160 (5th Cir. 1982).

126. *See supra* notes 70–78 and accompanying text.

127. *See* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 575 (1985). *But cf.* Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 115 (1984) (Abstention constitutes "judicial lawmaking" which violates the separation of powers: "it is not the judiciary's function to modify or repeal a congressional enforcement network" unless authorized by Congress, and "throughout the nation's history, Congress has retained for itself the authority to decide when federal courts should decline to exercise their jurisdiction.").

128. 383 U.S. 715 (1966).

129. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 619 (1988). Although *Gibbs* had nothing to do with removal and thus the Court would have had no reason to discuss remand, the dissent in *Cohill* curiously argued that "[t]he *Gibbs*

indicated that if it is inappropriate to assert jurisdiction,[130] the pendent claims may be "left for resolution to state tribunals,"[131] and remand, like dismissal, would serve that objective.[132] As the Supreme Court stated in *Cohill*:

> *Gibbs* establishes that the pendent jurisdiction doctrine is designed to enable courts to handle cases involving state-law claims in the way that will best accommodate the values of economy, convenience, fairness, and comity, and Gibbs further establishes that the judicial branch is to shape and apply the doctrine in that light.[133]

Two major fairness issues need to be addressed when remand power over pendent claims is granted to district courts: statutes of limitations barring plaintiff's pendent state law claims and potential forum manipulation by the plaintiff.

A. *Statutes of Limitations Barring the Pendent Claims*

Without discretion to remand, dismissal of the plaintiff's pendent claims after the statutes of limitations on the claims have expired would preclude the plaintiff from litigating his claims.[134] While the plaintiff bears the risk of insubstantial federal law claims and dismissal of the pendent claims when he brings an action in federal court, considerations of fairness are different when the defendant removes the action from state court because the defendant controls access to federal court.[135] Once substantial claims are brought in state court, they should remain in the judicial system and should not be thwarted from adjudication on the merits merely because the defendant removed the case to federal court and that forum is deemed to be inappropriate for litigating the claims. Judicial economy and convenience may be hampered because the potential bar to relief after removal may chill plaintiffs from bringing removable federal law claims in state court, especially if the validity of the claims is debatable.[136] Furthermore, a litigant who has initiated a federal law claim with state law claims might genuinely discover the inviability of the federal law claim and the need for voluntary dismissal,[137] or an involuntary dismissal or other adjudication of the federal claim may occur.[138]

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opinion did not even suggest any inherent power in the federal courts to remand pendent claims." *Id.* at 625 (White, J., dissenting).

130. The remand of pendent claims might occur even when the federal claims are still in federal court, and the judge feels that the state court should hear the claims. *See, e.g.*, National Audubon Soc'y v. Department of Water, 858 F.2d 1409, 1417 (9th Cir. 1988) (plaintiff's claims severed from a federal common law claim and remanded to state court to give them a "sure-footed reading of applicable law," even though federal court has made a substantial commitment of judicial resources to the state claims).

131. *Gibbs*, 383 U.S. at 726–27.

132. *Contra* Steinman, *supra* note 37, at 969.

133. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 619 (1988).

134. *Cohill*, 108 S. Ct. at 619.

135. Comment, *supra* note 31, at 621–22. *But see* Cook v. Weber, 698 F.2d 907, 909 (7th Cir. 1983) ("Plaintiffs in such circumstances cannot complain that they are forced to try what turns out to be a purely state law claim in federal court, since it was plaintiff's decision to contain a federal claim in the original complaint which enabled defendant to remove to federal court.").

136. *Cohill*, 108 S. Ct. at 619–20 n.9.

137. *See infra* note 185 and accompanying text.

138. Potential reasons for involuntary dismissal include summary judgment, directed verdict, failure to state a claim upon which relief can be granted, insufficiency of process or service of process, improper venue, lack of personal or

With the power to remand pendent state law claims available to district court judges, plaintiffs should be less likely to expend needless time and energy in litigating attenuated and frivolous federal claims simply to prevent the state claims from being time-barred due to dismissal from federal court.[139] As for substantial federal claims brought by plaintiffs, the district courts might be inclined to dispose of them more swiftly: since authority to remand assures that there will be no time bars on pendent state law claims, the district judges do not need to be concerned with preserving a forum for those claims by maintaining jurisdiction over federal law claims.[140]

A plaintiff might defeat removal in the first instance by avoiding federal allegations in his state court action since he has the election of whether or not to engineer a complaint with such claims.[141] But a plaintiff might be barred by res judicata from later litigating his federal claims if he fails to bring them with his state claims in the first action,[142] so he will have to ponder this weighty consideration in deciding whether to avoid instituting the federal claim.

Justice White's dissent in *Cohill* complained that states have sufficiently protected plaintiffs whose federal law claims prove unsound by enacting saving clauses which negate the time bar on the other claims.[143] Saving clauses generally provide that when a party has timely commenced an action that fails for some reason unrelated to the merits, another action for the same cause may be brought within a limited period following dismissal of the first action.[144] A statute of limitations will not be a bar to the second action if that action is within the scope of the saving

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subject matter jurisdiction, and dismissals for mootness, ripeness, standing, exhaustion of remedies, and other prudential and abstention principles.

139. Note, *supra* note 90, at 206.

140. *Id.* This note also contended that since defendants are more likely to face litigation in state court if their claims are remanded rather than dismissed and possibly refiled, there may be a tendency to avoid pursuing a dismissal or summary judgment of a federal claim. *Id.* This seems implausible, however, because a defendant has a natural tendency to want to have claims against him, and thus any potential liability, dismissed. Furthermore, plaintiffs can easily reassert dismissed claims in state court unless they are barred by statutes of limitations, so the likelihood of facing state court litigation is truly similar in both instances.

141. Austwick v. Board of Educ., 555 F. Supp. 840, 842 (N.D. Ill. 1983) ("[W]hen a plaintiff chooses a state forum, yet also elects to press federal claims, he runs the risk of removal. . . . If a state forum is more important to the plaintiff than his federal claims, he should have to make that assessment before the case is jockeyed from state court to federal court and back to state court."). *See also* Jones v. General Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976) ("the plaintiff has the prerogative of determining the theory of his action and, so long as fraud is not involved, he may defeat removal to the federal courts by avoiding allegations which provide a basis for the assertion of federal jurisdiction").

142. Res judicata requires that a plaintiff litigate his entire claim in one judicial proceeding and precludes him from later reasserting the same claim against the same defendant or a party in privity. RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1980); Matasar, *supra* note 81, at 111–14 & n.40; Vestal, *Extent of Claim Preclusion*, 54 IOWA L. REV. 1 (1968); Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 NW. U.L. REV. 357 (1967).

143. *Cohill*, 108 S. Ct. at 625 (White, J., dissenting). *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-504 (Supp. 1988); ARK. STAT. ANN. § 16-56-126 (Supp. 1987); CONN. GEN. STAT. ANN. § 52-592 (West Supp. 1988); DEL. CODE ANN. tit. 10, § 8118 (1974); ILL. ANN. STAT. ch. 110, para. 13-217 (Smith-Hurd 1984); MASS. GEN. L. ch. 260, § 32 (1986); OHIO REV. CODE ANN. § 2305.19 (Anderson 1984); OKLA. STAT. tit. 12, § 100 (1981 & Supp. 1984); 42 PA. CONS. STAT. ANN. § 5535 (Purdon 1981).

The Pennsylvania saving statute provides in part:

> If a civil action or proceeding is timely commenced and is terminated, a party . . . may . . . commence a new action or proceeding upon the same cause of action within one year after the termination and any other party may interpose any defense or claim which might have been interposed in the original action or proceeding.

42 PA. CONS. STAT. ANN. § 5535(a)(1) (Purdon 1981).

144. W. FERGUSON, THE STATUTES OF LIMITATION SAVING STATUTES 1 (1978).

clause.[145] Because these clauses are not present in every state, plaintiffs in states without a mechanism for preserving claims will be inequitably barred as compared to plaintiffs in other states.[146] The irrationality and deficiency of such protection is amplified when the sole remedy to stay the limitations bar completely in this manner is the enactment of saving clauses by these states,[147] a possibility far from certain.

In *Cohill*, the Pennsylvania saving statute would not have saved the plaintiffs' pendent claims even if the district court had dismissed rather than remanded them because the action was dismissed voluntarily by the plaintiffs.[148] The filing of a new action would be time-barred under the Pennsylvania statute of limitations regarding tort actions.[149] The dissent contended that the saving clause would have saved the claims had the federal claims been dismissed involuntarily rather than voluntarily.[150] It would refuse the saving of pendent claims, out of concern for forum manipulation, if the federal claims which provided the basis for federal court jurisdiction were voluntarily dismissed by plaintiffs. However, plaintiffs may find it necessary to dismiss their federal claims and thus would be unjustly barred from litigating their state law claims which were validly initiated in state court.[151] In deciding whether plaintiffs may be prejudicially hindered from litigating their claims, courts can take into account the purposes of statutes of limitations. Besides encouraging the diligence of plaintiffs[152] and providing notice to the defendant,[153] statutes of limitations are designed "to afford security against stale demands, after the true state of the

145. *Id.*

146. *See Cohill*, 108 S. Ct. at 620 n.10.

147. *See* Carnegie-Mellon Univ. v. Cohill, 41 Fair Empl. Prac. Cas. (BNA) 1046, 1051 (3d Cir. 1986) ("The serious limitations problem . . . can be readily ameliorated by enactment of such clauses by the remaining states."); Steinman, *supra* note 37, at 971 (dismissal of pendent claims by the federal courts sitting in states without saving clauses "*might trigger* state legislative or judicial action to save the state law claims." (emphasis added)).

148. The statute excludes from saving actions terminated by "voluntary nonsuit[s]" and "discontinuance[s]." 42 PA. CONS. STAT. ANN. § 5535(a)(2)(ii) (Purdon 1981).

The Pennsylvania statute providing for transfer and preservation of erroneously filed matters, 42 PA. CONS. STAT. ANN. § 5103 (Purdon 1981 & Supp. 1988), would be inapplicable to the remand of pendent claims unless the district court determined that jurisdiction over the federal claim, which provides for pendent jurisdiction over the state law claims, was lacking. *See* Weaver v. Marine Bank, 683 F.2d 744 (3d Cir. 1972) (because federal securities law jurisdiction was lacking, proper disposition of pendent state law claims was to transfer them pursuant to the Pennsylvania statute). *Contra* Steinman, *supra* note 37, at 971 & n.238 (Pennsylvania statute would prevent any state law claim that had been dismissed without prejudice by a federal court after removal from being time-barred).

149. 42 PA. CONS. STAT. ANN. § 5524 (Purdon 1981 & Supp. 1988).

150. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 626 (1988) (White, J., dissenting).

151. *But see* W. FERGUSON, *supra* note 144, at 312. Ferguson states that:

> If the first suit gives notice to the defendant of the nature of the claim, then the primary purpose of the statute has been fulfilled. However, the reason to give relief from the statutes of limitations is to save plaintiff from foundering on procedural technicalities that prevent a trial on the merits. If the action is voluntarily dismissed by plaintiff rather than foundering on procedural technicalities, then it is not within the reason of the [saving] statute and should not be encompassed within it. To permit such use of the statute provides the plaintiff with a tool to enable it to defeat the trial of the action and thus defeat the secondary purpose of limitations, trial of the merits while memories are still fresh.

Id. at 312.

However, Ferguson continues with a possible exception: "To deny the benefits of the saving statute in cases involving voluntary nonsuits would seem to be unfair only in those cases when the first suit is in troubled waters and the court is delaying making the decision bringing it to a halt." *Id.* An action in "troubled waters" might include a case in federal court with only pendent claims remaining following dismissal of the inviable federal issue by the plaintiff in good faith; thus the volitional nature of the dismissal should probably be ignored with respect to the saving statutes.

152. *Id.* at 59.

153. *Id.* at 312.

transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses."[154]

Instead of dismissing the pendent claims, the district court may retain pendent jurisdiction over them to protect them from being barred by statutes of limitations.[155] This is hardly satisfying because the claims properly belong in state court.[156] Purely state claims should be expunged from federal courts whenever possible since there is no policy reason for those courts to hear them: "[w]here the federal element which is the basis for jurisdiction is disposed of early in the case, as on the pleadings, it smacks of the tail wagging the dog to continue with a federal hearing of the state claim."[157] Eighteen states agreed with this proposition and submitted an amicus curiae brief to the Supreme Court in the *Cohill* action in favor of pendent claim remand.[158] When the plaintiff deletes his federal question claim, he is indicating that he no longer needs his federal rights guarded.[159] Moreover, the defendant's right of removal to protect his right to have federal claims heard in federal court does not need to be preserved.[160] The pendent claims are now pendent to nothing and are left dangling in federal court.

Recognizing discretion to remand would allow the district courts to focus on the factors outlined in *Gibbs*,[161] including the avoidance of "[n]eedless decisions of state law."[162] It is outlandish to force a federal court to decide unsettled questions of state law or other questions more properly decided by the state court merely because the plaintiff may be prevented from refiling in state court when the case could otherwise validly be dismissed.[163]

Another option to protect pendent claims from the interdiction of statutes of limitations and to avoid the retention of the claims in federal court is to condition the dismissal of the pendent claims upon the defendant's waiver of the statute of limitations defense in a promptly recommenced state court suit.[164] A defendant who wants to remain in federal court could refuse to comply with the condition and force

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154. Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360 (1828) (Story, J.).

155. Cook v. Weber, 698 F.2d 907, 909 (7th Cir. 1983).

156. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 620 n. 10 (1988).

157. McFaddin Express, Inc. v. Adley Corp., 346 F.2d 424, 427 (2d Cir.), *cert. denied*, 382 U.S. 1026 (1965). *See also* United Mine Workers v. Gibbs, 383 U.S. 715, 726–27 (1966).

158. Amici Curiae Brief of States of Ala., Alaska, Ark., Cal., Haw., Idaho, Ind., Ky., La., Nev., N.M., Ohio, S.D., Tenn., Tex., Utah, Wash. and Wis. in Support of Respondents, Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988) (No. 86-1021).

159. Note, *supra* note 90, at 208.

160. *Id.*

161. *In re* Romulus Community Schools, 729 F.2d 431, 439 (6th Cir. 1984).

162. *Gibbs*, 383 U.S. at 726. Such decisions are to be avoided "both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Id.* Claims "relatively novel, complex and of great local importance" should be withdrawn from federal court. Fox v. Custis, 712 F.2d 84, 90 (4th Cir. 1983).

Other factors the courts are to consider in deciding whether to exercise pendent jurisdiction include: (1) whether the federal claims were dismissed before trial; (2) whether the state issues substantially predominate; (3) whether the state claim is closely tied to federal policy; and (4) the likelihood of jury confusion. *Gibbs*, 383 U.S. at 726–27.

163. *Romulus*, 729 F.2d at 439. *See also* Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A., 711 F.2d 989, 1000 (11th Cir. 1983) ("It is not the function of a federal court to rescue a party from the danger of limitation by permitting the litigation of inappropriate matters in federal court.").

164. Steinman, *supra* note 37, at 971 & n.239 (citing cases).

the federal court to adjudicate the pendent claims.[165] While this might be a rare occurrence since defendants will not likely choose to irritate the federal court judge,[166] the undesirable potential of forcing federal courts to hear claims that belong in state court is certainly still present, especially since the defendant may feel that he will benefit from such an adjudication.

If federal courts are constrained to retain jurisdiction because they are not allowed to remand, it may be an abuse of discretion for a trial court to dismiss pendent claims after the statute of limitations has run.[167] But to retain jurisdiction over claims that belong in state court might be an abuse of discretion.[168] By precluding judges from remanding pendent claims, the dissent would place the courts in a perplexing quandary.

This dilemma is still present after *Cohill* when a cause of action originates in federal court since remand to state court to save the pendent claims from being time-barred is not an option. District courts, in both removed and originally initiated cases, have often considered in the balance of factors under *Gibbs* whether to retain jurisdiction over pendent claims because of statutes of limitations and the unavailability of another forum.[169] The district court might have a difficult time balancing the considerations when other factors mitigate against the federal court adjudicating the claims. Thus, the remand power frees the courts from this particular problem in removed cases. It allows the courts to focus on the key pendent jurisdiction factors—state comity, judicial economy, and convenience—instead of time bars from statutes of limitations.

Recognizing the authority to remand will result in a different balancing depending on whether state law claims are initiated in federal or state court.[170] Pendent claims contained in similar cases may be adjudicated differently depending on their procedural history. Nonetheless, the beneficial effect of more intelligent and

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165. *Id.* at 971.

166. *Id.*

167. Herrmann, *supra* note 50, at 423. "Fairness to litigants" might require the federal court to retain jurisdiction and hear the remaining state law claims. *See, e.g., Quality Foods*, 711 F.2d at 999–1000 (11th Cir. 1983); Fontaine v. Home Box Office, Inc., 654 F. Supp. 298, 302 (C.D. Cal. 1986).

168. *See, e.g.*, Financial Gen. Bankshares v. Metzger, 680 F.2d 768 (D.C. Cir. 1982) (abuse of discretion in exercising pendent jurisdiction over novel and unsettled question of District of Columbia law after dismissal of the federal claim).

169. *See, e.g.*, Baylis v. Marriott Corp., 843 F.2d 658, 665 (2d Cir. 1988) ("[a]n alternative forum is available to the plaintiffs in the state courts"); United States v. Zima, 766 F.2d 1153, 1158 (7th Cir. 1985) (fairness in the balance of factors particularly relates to the "prejudicial passage of state limitations periods"); Pharo v. Smith, 625 F.2d 1226, 1227 (5th Cir. 1980) ("[t]hat a plaintiff's state law claims will be time-barred if dismissed is certainly a factor, if not a determinative factor, a district court should consider in deciding whether to maintain jurisdiction over pendent state claims once the federal claims have been resolved"); O'Brien v. Continental Ill. Nat'l Bank & Trust Co., 593 F.2d 54, 65 (7th Cir. 1979) (state law claims should not have been dismissed involuntarily because "plaintiffs should have been permitted to pursue their pendent state claims in the federal actions . . . when there [was] a substantial possibility that a subsequent state court suit on the claim [would] be time-barred"); Baez v. American Cyanamid Co., 685 F. Supp. 303, 309 (D.C.P.R. 1988) (following *Cohill*, the court was only concerned with whether the plaintiff could litigate in the local courts); Kaib v. Pennzoil Co., 545 F. Supp. 1267, 1271 (W.D. Pa. 1982) ("[w]e have deliberately selected a remand as to the added defendants, rather than dismissal, because plaintiff may be prejudiced by interdiction of the statute of limitations").

170. The dissent in *Cohill* argued that because the plaintiff commenced the pendent claims in state court, the claims are less likely to be adversely affected by statutes of limitations than claims initiated in federal court. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 625 (1988) (White, J., dissenting).

reasoned balancing in some cases justifies any inconsistencies. The disparity in the balancing may be paradoxical, but it is not unfair. No way currently exists to avoid the time bar fairness concern for causes of action initiated in federal court. Remand is always possible following removal of a case, but no procedure other than dismissal is available for disposal of claims initiated in federal court. Besides, the remand procedure is not being used merely to save a plaintiff's claims, but as the traditional procedure used following removal in order to get claims out of federal court.

The district courts might not even give the time bar concern much weight in the balance for pendent claims initiated in federal court. They might retain jurisdiction over the pendent claims only if fairness strongly demands retention; the other *Gibbs* considerations are likely to be deemed more important and outweigh any element of fairness.[171] As a result, the potential for significant incongruities in the balance of factors in substantively similar but procedurally different cases may be further reduced.

B. *Forum Manipulation by the Plaintiff*

Forum manipulation by the plaintiff is improper because it results in delay and expense to a defendant and is a needless burden on the resources of the judicial system. *Cohill* appropriately handles the problem of forum manipulation by the plaintiff.[172] Prohibiting the remand of all cases involving pendent claims out of concern for forum manipulation is absurd. The district court can consider in the *Gibbs* balance of factors whether the plaintiff has been jockeying the defendant between state and federal courts.[173] To be fair to defendants, the courts should be more willing

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171. "[A]lthough the potential statute of limitations bar is a necessary consideration, it is not the only consideration." *Quality Foods*, 711 F.2d at 1000. The court will most likely exercise its discretion not to hear the pendent claims once the federal law claim providing jurisdiction is dismissed. The Court in United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966), stressed the importance of other factors and the basis for exercising the discretion over pendent claims:

> The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation, dismissal of the state claim might even then be merited. For example, it may appear that the plaintiff was well aware of the nature of his proofs and the relative importance of his claims; recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.

Besides the possible time bar from statutes of limitations, the plaintiff might argue that a dismissal of pendent claims is an abuse of discretion because of lengthy pretrial proceedings that have occurred in the federal court. Danner v. Himmelfarb, 858 F.2d 515, 523–24 (9th Cir. 1988). In *Danner*, the plaintiff claimed an abuse of discretion in dismissing the claims "after $3\frac{1}{2}$ years of discovery and pretrial wrangling" because he was then "forced to refile his action in California state court" and he feared it would be several years before his claims would be set for trial. *Id.* The court held that the fairness concern sometimes present when dismissed claims are time-barred is likely not to be present when the plaintiff "simply asserts that it is inconvenient for him to have to refile in state court" in light of the other pendent jurisdiction factors. *Id.* The passage of time, even when resulting in the state law claims being time-barred, might not be a weighty enough consideration to warrant the district court's retaining jurisdiction as it is "by no means determinative." *Id.*

172. *See* Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 622 (1988).

173. *See supra* note 162 and accompanying text (factors courts should consider); *In re* Romulus Community

to adjudicate pendent claims under its removal jurisdiction than under its original jurisdiction: "A plaintiff should not be permitted to jockey the defendant back and forth between state and federal courts by deleting her federal law claims and moving for remand at strategic moments."[174] Moreover, the capability of the plaintiff to argue for remand rather than dismissal will be unlikely to modify to any notable extent the manipulative incentives to plaintiffs whose claims are not time-barred.[175]

As an additional disincentive, the broad joinder provisions of parties and claims under the Federal Rules of Civil Procedure[176] create a potential for serious problems arising from possible res judicata effects.[177] Dismissing a federal claim simply to manipulate the forum may mean that the federal claim is forever barred; as a result, such manipulation is impliedly discouraged. Furthermore, Rule 11[178] sanctions may be available against a plaintiff's attorney for pleadings, motions, or other papers interposed for any improper purpose, "such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[179]

To make a dismissal of the federal claims more equitable, the court might require the plaintiff to pay the defendant's costs, expenses, or attorney fees.[180] These penalties would act as another restraint on the plaintiff in attempting to manipulate the forum. In cases of extreme and obvious orchestration, the plaintiff may be required to agree that he will not assert his federal claims in a later action.[181] However, res judicata would prevent the relitigation of the deleted federal claim notwithstanding this agreement if the federal claim is in reality the same cause of action against the same defendant as one of the state claims.[182] If the federal claim is against different

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Schools, 729 F.2d 431, 440 (6th Cir. 1984) ("Determining when such dilatory tactics have occurred and when the effects of such tactics outweigh considerations of comity, is best left to the sound discretion of the district court.").

174. Comment, *supra* note 31, at 622. *See also* Westmoreland Hosp. Ass'n v. Blue Cross, 605 F.2d 119, 123 (3d Cir. 1979) ("[a] subsequent amendment to the complaint after removal designed to eliminate the federal claim will not defeat federal jurisdiction"), *cert. denied*, 444 U.S. 1077 (1980); *In re* Greyhound Lines, Inc., 598 F.2d 883, 884 & n.1 (5th Cir. 1979) ("plaintiff cannot precipitate a remand of the action by amending complaint to eliminate federal claim," particularly when plaintiff's dismissals are made voluntarily for tactical reasons).

175. Steinman, *supra* note 37, at 974. "Through either device those plaintiffs can subject defendants to whatever duplication and cost or disfavor may be entailed in going back to state court." *Id.*

176. *See, e.g.*, FED. R. CIV. P. 18(a) (joinder of all claims one party has against an opposing party), 20(a) (plaintiffs may join several defendants or join with others as multiple plaintiffs), 13(a)–(b) (counterclaims against opposing parties), 13(g) (cross-claims), 13(h) (joinder of additional parties to cross-claims and counterclaims), 14 (impleader), 22 (interpleader), and 24 (intervention).

177. *See supra* note 142 and accompanying text.

178. FED. R. CIV. P. 11.

179. The removal procedure under 28 U.S.C. § 1446 (1982), *as amended by* the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669–70 (1988), now explicitly requires that the "notice of removal" (previously called the "petition") be signed in accordance with Rule 11 and that the notice contain "a short and plain statement of the grounds for removal."

180. Note, *supra* note 90, at 210. This note suggested through an analogy to voluntary dismissals under FED. R. CIV. P. 41(a)(2) that this is also fair to plaintiff because it is plaintiff's option whether or not he wants to accept the conditions that the court places on his amendment deleting the federal claims. *Id.* at 210–11. An analogy to the new § 1447(c) can also be made, which states that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4670 (1988).

181. Note, *supra* note 90, at 211. *See, e.g.*, Philadelphia Gear Works v. Kerotest Mfg. Co., 101 F. Supp. 820 (W.D. Pa. 1951) (motion of plaintiff to dismiss patent infringement suit, which was in its preliminary stages, granted on condition that plaintiff would not again assert a claim against defendant for infringement).

182. *See supra* note 142 and accompanying text.

parties who were brought into the case with pendent party jurisdiction or is simply a different cause of action than any of the state law claims, this forbearance may be necessary since res judicata would unlikely bar reinitiation of the federal claim.

In *Cohill*, after defendants removed, extensive discovery occurred over a six month period and was prolonged several times at plaintiffs' request.[183] Only then did plaintiffs discover that their federal law claim was not tenable and subsequently moved to remand the case. Defendants intimated that the amendment was sought because the case was ripe for summary judgment or trial, and that plaintiffs wanted to delay immediate disposition of the state law claims to increase their chances for an advantageous settlement.[184] However, plaintiffs may have legitimately discovered a valid reason for deleting the federal law claim during discovery.[185] If so, plaintiffs needed to eliminate this claim of dubious merit: "To do otherwise would be to force plaintiff to litigate a federal claim which he now does not wish to litigate (and, of course, require defendant to defend a claim which plaintiff chooses not to pursue)."[186] In any event, the district judge in making his decision to remand, dismiss, or retain jurisdiction over pendent claims can take any manipulation into account.

The commotion over forum manipulation might not be very significant once the plaintiff decides that he is willing to give up his federal question. The expenditures of time and resources by courts and litigants as a result of the jockeying back and forth from federal and state courts are likely to be relatively small.[187] Additionally, the federal court will not have a legitimate interest in preventing the jockeying since a federal claim that belongs in federal court is no longer present.[188]

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183. Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 6, Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988) (No. 86-1021). The petition stated:

> Following its removal, this case was actively litigated. An answer was filed. [Defendants] took the depositions of the Boyles. They also served and obtained responses to extensive requests for production of documents, deposed William Boyle's physician, and reviewed his medical records. [Defendants] responded to the Boyles' extensive document production requests and permitted them to review a significant amount of C-MU [Carnegie-Mellon University] documents pursuant to those requests.

Id.

184. Carnegie-Mellon Univ. v. Cohill, 41 Fair Empl. Prac. Cas. (BNA) 1046, 1051 (3d Cir. 1986); Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 623 (1988) (White, J., dissenting) (plaintiffs' counsel explained that his principal reason for seeking the remand was to avoid a prompt trial on the state claims; the opportunities for extracting a favorable settlement from defendants would be greater if the case were remanded because the state court dockets were considerably more congested than the federal court dockets).

185. *Cohill*, 41 Fair Empl. Prac. Cas. at 1047. In discovery, it was disclosed that plaintiff William Boyle had never filed any age discrimination charge with a federal or state agency, a prerequisite for suit under the Age Discrimination in Employment Act, 29 U.S.C. §§ 626(d), 633(b) (1982).

The issue of whether plaintiff has engaged in manipulative tactics in deciding to delete his federal claim should be within the sound discretion of the trial court. A voluntary dismissal may be the result of discovery, new decisions, further research, and other considerations which destroy or minimize any facial inference of manipulation. Amicus Curiae Brief of the Dep't of Water and Power of Los Angeles at 20 n.4, Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988) (No. 86-1021).

186. Austwick v. Board of Educ., 555 F. Supp. 840, 842 (N.D. Ill. 1983).

187. Steinman, *supra* note 37, at 966.

188. *Id.*

V. Lack of Significant Distinction Between Remand and Dismissal of Pendent Claims

Besides the benefits of pendent claim remand, remand of removed claims is the same thing as dismissal without prejudice with respect to any federal interest.[189] "'[C]rucial distinctions"'[190] between dispositions by remand and dismissal do not exist. While the issue of whether to remand or dismiss affects the application of statutes of limitations,[191] dismissal severely harms plaintiffs because it allows defendants to escape liability from properly filed claims by means of an inequitable legal mechanism. The issue of whether to remand or dismiss also may affect the reviewability of the court's order.[192] Orders remanding pendent claims are, nonetheless, reviewable on appeal,[193] as are orders to dismiss claims.[194] Even though the issue affects the priority of the case upon its return to state court,[195] concern over priority is not enough to warrant precluding the courts from remanding pendent claims.

Plaintiffs may be encouraged to bring cases with claims arising under both federal and state law in state court since their state law claims are less likely to be time-barred,[196] but the case can easily be removed to federal court and the pendent claims adjudicated there. Besides, any time bar advantage gained from starting in state court—with the availability of the power to remand pendent claims in federal court—would occur only if defendants remove, plaintiffs decide to delete their federal claims, the pendent state law claims then are precluded from being refiled

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189. Fox v. Custis, 712 F.2d 84, 89 n.4 (4th Cir. 1983).

190. Cook v. Weber, 698 F.2d 907, 908 (7th Cir. 1983).

191. *Id. See supra* text accompanying note 134.

192. *Cook*, 698 F.2d at 908.

193. "[O]nly remand orders issued under § 1447(c) and invoking the grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under § 1447(d)." Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 346 (1976). Because pendent claim remand is not based on § 1447(c), orders remanding such claims are not immune from review under § 1447(d), which provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." *See supra* notes 51–56 and accompanying text. *See also* Hewlett v. Davis, 844 F.2d 109 (3d Cir. 1988) (in this case decided after *Cohill* and which discusses *Thermtron*, the court stated that an order remanding plaintiff's motion to mold the verdict could be reviewed because the remand was on grounds not authorized by § 1447(c)). *But see* Steinman, *supra* note 37, at 991–1011 (reviewability of remand orders of pendent claims unclear, and possibly anomalous with the appellate review of other dispositions of claims).

Because the 1988 amendment to § 1447(c) merely divided the "improvident" and "without jurisdiction" elements in order to provide for waiver of defects in removal procedure if not raised in a timely manner, see *supra* note 53 and accompanying text, it is unlikely that the new provision affects the reviewability of the remand order under these prior precedents interpreting old § 1447(c). The legislative history of the amendment specifically exempts pendent claim remand from coverage under § 1447(c). *See supra* note 56 and accompanying text. Thus, the *Thermtron* quote above has been affirmed such that § 1447(d) does not preclude review of remand orders of pendent claims since the remands are not based on § 1447(c).

194. 28 U.S.C. § 1291 (1982) provides in part: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

195. *Cook*, 698 F.2d at 908.

196. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 625 (1988) (White, J., dissenting). Because a pendent claim brought initially in federal court can only be adjudicated or dismissed, dismissal of the claim after the statute of limitations has run would bar the plaintiff from refiling, absent a state saving clause. However, a pendent claim brought in state court and then removed to federal court can be protected from the time bar by remanding it to state court.

because of statutes of limitations, and the federal court decides not to retain jurisdiction over them.[197]

While defendants might be discouraged from removing the case if they cannot afford the round trip to federal court and back,[198] a round trip will occur only if the federal forum is unsuitable for the pendent claims. The costs and hassles of removal have been further decreased because Congress recently abolished the bond requirement of 28 U.S.C. section 1446(d).[199] Moreover, defendants have no right to have such claims heard in federal court,[200] and resulting stratagems by plaintiffs always will be speculative when defendants decide whether to remove.[201] Any harmful manipulation can be taken into account in determining whether to remand or dismiss.[202] Remand might even be less costly and time-consuming than dismissal, since the state court would not have to process a new case.[203] Furthermore, the means of preventing impairment of state courts might be different in the removal and remand situation, as compared with the exercise of the dismissal option, because of the "prejudice inherent in delaying and complicating procedurally the state court's exercise of jurisdiction by requiring the reinitiation of already commenced litigation rather than permitting the prudential return of the previously exercised jurisdiction by remand."[204]

The presence of an option to remand pendent claims may exacerbate existing difficulties by not deterring, and conceivably causing, the inclusion of carelessly considered federal law claims in state court complaints. Plaintiffs may realize that once a case is removed, they can drop their federal claim and seek a remand, being reasonably confident that the remand will be granted because the state law claims will

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197. Steinman, *supra* note 37, at 974. Steinman states: "[A]nd plaintiffs later decide to dismiss their federal claims, and those claims would be time barred on refiling. . . ." Steinman probably meant to say that the state law claims, and not the federal claims, would be time-barred.

198. *Cohill*, 108 S. Ct. at 625.

199. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4670 (1988). The bond requirement was a surety conditioned that the defendants would pay all costs and disbursements incurred by reason of the removal proceedings if it were determined that the case was not removable or improperly removed. While the surety would generally not have had to pay the bond in the pendent claim remand situation since removal in such cases is neither without jurisdiction nor improper, the defendant would still have had to obtain the bond in order to remove the case. Congress was concerned that the bond requirement imposed a cost that might be "substantial to some litigants, and constitute[d] an additional procedural complication. A bond is not required on filing an action, and should not be required on removal." H.R. REP. No. 889, 100th Cong., 2d Sess. 72 (1988). Congress stated that the new section 1447(c) "will ensure that a substantive basis exists for requiring payment of actual expenses incurred in resisting an improper removal; civil rule 11 can be used to impose a more severe sanction when appropriate." *Id.*

200. *See supra* notes 113–19 and accompanying text.

201. Steinman, *supra* note 37, at 974.

202. *See supra* notes 172–88 and accompanying text.

203. The dissent in *Cohill* disagreed with this argument. *Cohill*, 108 S. Ct. at 625 n.2 (White, J., dissenting).

204. Amicus Curiae Brief of the Dep't of Water and Power of Los Angeles at 21–22, Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988) (No. 86-1021). The Department continued:

> In light of the fact that but for the removal the impairment would not have occurred, once the basis for the removal has disappeared, or the court notes the character of the pendent state claims to be such that abstention is required, the action to be taken should be to remand the matter to state court which was originally ousted of jurisdiction thereby to avoid determining or delaying the determination of an issue more properly handled by that court.

Id. at 22.

inevitably predominate after deletion of the federal law claims.[205] But the wastefulness of needless removal and remand proceedings resulting from these insubstantial claims is similar to the wasted litigation costs that occur whenever frivolous claims are initiated. These federal claims are also subject to the guillotine of dismissal in state court if they are deemed to be insubstantial, so removal of the case can be easily prevented. In any event, the same incentive to include carelessly considered federal law claims is created whether or not the district courts are allowed to remand pendent claims. The *Cohill* dissent argued that if the state law claims following removal are dismissed without prejudice from federal court, the plaintiff can simply reintroduce the pendent claims in state court. To prevent these claims from being time-barred, the dissent would encourage the adoption of state saving clauses. Thus, plaintiffs would have the same predilection to bring tenuous federal law claims under both schemes, because time bars on the state law claims would always be ineffective.

Since no vital difference exists between remand and dismissal of pendent claims, district courts should be free to choose either in dealing with pendent claims to best serve the policies of pendent jurisdiction.

VI. Conclusion

The discretion to remand pendent claims might seem unnecessary since courts currently can dismiss such claims and no "crucial distinctions" exist between remand and dismissal. This ability may also appear to be an unauthorized usurpation of power by the district courts which should not be condoned. However, the unfair application of statutes of limitations on pendent claims and the dismissal predicaments in which courts become entangled are reason enough to justify the doctrine of pendent claim remand.[206] Federal courts now have a broader scope of action in order to ensure judicial economy and fairness to litigants. In light of the *Gibbs* pendent jurisdiction rationale, the majority in *Cohill* is not afraid to provide the courts with the necessary remand power and discretion. Why leave it up to the states to independently elucidate and rectify the problems of pendent claim dismissal and federal court retention—with saving clauses, filing fee waivers, and docket priority modifications[207]—when the authority to remand is easily accorded to the district courts? Moreover, the "discovery" of pendent claim remand can hardly be deemed an usurpation of congressional authority when Congress itself in the legislative history of the 1988 amendments to the removal provisions approved of this extra-statutory ability to remand.[208] Discretion to remand makes common sense: it can be quite beneficial, it

205. Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 16, Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988) (No. 86-1021).

206. "A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity." Reed v. Allen, 286 U.S. 191, 209 (1932) (Cardozo, J., joined by Brandeis and Stone, JJ., dissenting).

207. Steinman, *supra* note 37, at 972.

208. *See supra* note 56 and accompanying text. Pendent claim remand might be attacked as violative of the Constitution even though Congress has approved of the procedure, but that is unlikely since Congress has plenary authority to regulate practice and procedure in the federal courts and its acceptance of the Supreme Court's decision in *Cohill* can be seen as an exercise of that authority.

produces no significant adverse effects, and it does not engender any meaningful controversy. So why not remand?

As a further safeguard, the *Gibbs* considerations which the district courts are to consider in determining whether to retain jurisdiction over pendent claims—judicial economy, convenience, fairness, and comity—are not "amorphous" considerations but have real bite. In *Hewlett v. Davis*,[209] a recent case decided after *Cohill*, the Third Circuit reversed a remand to state court of the plaintiff's motion to mold the verdict following a jury verdict favorable to defendant.[210] The court found no indication that the remand was prompted by any of the *Gibbs* factors.[211] It also noted that when the district court has conducted a full trial and has before it all the evidence on both the federal and pendent claims, the *Gibbs* considerations "counsel retention of any pendent claims requiring further proceedings."[212] The appellate courts are willing to examine closely whether or not the pendent jurisdiction factors are present when the district courts remand claims; they have previously done so when the district courts decided whether to dismiss or retain jurisdiction over pendent claims. Therefore, the assailable and illogical arguments against the beneficial and harmless power to remand are made even more tenuous.

Varying interpretations of the pendent jurisdiction factors with conflicting court determinations on whether to remand pendent claims are indeed possible. For example, the Third Circuit recently stated that "time already invested in litigating the state cause of action is an insufficient reason to sustain the exercise of pendent jurisdiction."[213] The length of time spent on a state claim, varying from "time invested" to a full trial, is likely to affect the decision of the court whether to retain jurisdiction over the pendent claims or to remand them. Attempting to determine with any consistency the importance of the time factor in each particular case would be arduous if not impossible.[214] The discretionary decisions of the district courts in determining whether to remand, dismiss, or retain jurisdiction over pendent claims—which may involve many other possible issues of comity, fairness, judicial economy, and convenience—will be often inconsistent and fairly mysterious. However, this concern is nothing new and it arises whenever courts are given discretionary power. Like other discretionary decisions, ascertaining how to administer pendent claims is challenging and requires a judgment call. The erratic and discrepant nature of such decisions must be accepted, unless obviously wrong.[215] Otherwise, resolutions would

209. 844 F.2d 109 (3d Cir. 1988).

210. *Id.* at 111–12. The motion alleged *inter alia* that the jury was presented only with the federal civil rights claim and not the pendent state law agency claim.

211. *Id.* at 116.

212. *Id.*

213. Lovell Mfg. v. Export-Import Bank of the United States, 843 F.2d 725, 735 (3d Cir. 1988) (quoting Weaver v. Marine Bank, 683 F.2d 744, 746 (3d Cir. 1982)).

214. *See* Danner v. Himmelfarb, 858 F.2d 515, 524 (9th Cir. 1988), in which the Court of Appeals stated that prior cases "do not hold that the district court must exercise jurisdiction over pendent state claims whenever there have been lengthy pretrial proceedings. The decision to exercise jurisdiction is discretionary." Moreover, an abuse of discretion will only arise when the court of appeals is "left with 'a firm and definite conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Id.* at 525 (quoting United States v. Schlette, 842 F.2d 1574, 1577 (9th Cir. 1988)).

215. *See, e.g.*, Hewlett v. Davis, 844 F.2d 109, 116 (3d Cir. 1988) (besides the lack of any consideration of the

never be reached since often no clear answer exists and strict guidelines to force congruous outcomes are inconceivable.

Another difficulty with the Court's decision in *Cohill* relates to the ramifications of *Thermtron*[216] and the potential danger that the Court in *Cohill* opened a Pandora's Box.[217] Instead of the majority's reading of *Thermtron* as merely precluding remands for reasons that would not support a dismissal without prejudice,[218] another interpretation perceives the focus of *Thermtron* to be that the remand was improper because the judge had remanded on grounds not authorized by 28 U.S.C. section 1447(c).[219] Pendent claim remand therefore should be prohibited: it is not authorized by section 1447(c) since the removal was not improvident or without jurisdiction.[220] Simply because a particular case can be dismissed without prejudice is not enough to allow its remand.

By allowing the remand of pendent claims through an interpretation of *Thermtron* as prohibiting remands of claims that would not support dismissals of such claims, the Supreme Court may be opening the door for the district courts to remand for other extra-statutory reasons since a whole range of doctrines permit federal courts to dismiss cases without prejudice.[221] These reasons include nonjusticiability, mootness, and abstention.[222] In *McIntyre v. Fallahay*,[223] the Court of Appeals for the Seventh Circuit determined that the district courts do not have discretion to remand claims to state courts on grounds of nonjusticiability or mootness, and that the courts could remand only if the removal was improvident or without jurisdiction.[224] While this pre-*Cohill* case did not permit the extra-statutory remand, the district courts may see the Supreme Court's decision in *Cohill* as providing remand authority in other cases.

For example, in *Corcoran v. Ardra Insurance Co.*,[225] a case decided in light of *Cohill*, the Second Circuit approved the district court's remand of a case on abstention grounds since the court had power to dismiss the action on those grounds. Rather than dismissing the action, the district court remanded it, thereby accommodating the "values of economy, convenience, and comity, and avoiding the delay involved in dismissing the federal litigation and requiring the parties to start anew."[226] It applied the *Thermtron* interpretation of the *Cohill* majority and found that such remand authority is not required to be statutorily defined.

Gibbs factors and the already conducted full trial, the Court of Appeals determined that the refusal to retain pendent jurisdiction over the claims was improper in light of the district court's equivocally remanding "in an abundance of caution").

216. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976).

217. Steinman, *supra* note 37, at 954–55.

218. *See supra* notes 96–119 and accompanying text.

219. Steinman, *supra* note 37, at 953–54.

220. *See supra* notes 51–56 and accompanying text.

221. Steinman, *supra* note 37, at 954–55.

222. *Id.* at 955.

223. 766 F.2d 1078 (7th Cir. 1985).

224. *Id.* at 1082.

225. 842 F.2d 31, 36 (2d Cir. 1988).

226. *Id.* The court also quoted Naylor v. Case & McGrath, Inc., 585 F.2d 557, 565 (2d Cir. 1978), which stated: "[A]bstention can be exercised through remand, assuring an adjudication of the state law issues in the pending action without risk of delay."

These prudential grounds for dismissal are distinguishable from pendent claim remand. Since Congress has left the development of the pendent jurisdiction doctrine to the courts[227] and has not attempted to provide statutorily for general pendent jurisdiction, even though such jurisdiction is suitable for statutory provisions as an ingredient of subject matter jurisdiction, the remand statutes and *Thermtron* should not be viewed as precluding the ability to remand pendent claims. However, the prudential doctrines of abstention and the like are true judicially imposed precepts. Congress has not left their evolution to the courts since Congress realistically has no power over these doctrines: they are not generally suitable for statutory delineation. Perhaps the remand statutes of the Judicial Code should be understood to apply to all cases other than pendent claims and, as a result, to preclude inherently the remand of properly removed cases based on these prudential doctrines.

The Supreme Court has "left the lower federal courts with little guidance as to how to make the choice between dismissal and remand in contexts outside of pendent jurisdiction problems."[228] Applying the *Cohill* principle to other areas may be seen as a severe imposition on the separation of powers and the statutory authority of Congress to provide for removal and remand, even though Congress has expressly sanctioned pendent claim remand.[229] Through the *Cohill* decision, the Supreme Court itself probably intends to limit its holding and to allow for extra-statutory remand only for pendent claims; thus, *Cohill* should not be hastily read by the district courts to warrant the remand of cases on other grounds not defined by the remand statutes.

Nevertheless, if courts do apply *Cohill* to other areas, the usurpation of congressional power will be insignificant. Remand is not truly any different from dismissal. The remand of cases and claims is generally more beneficial and efficient than dismissal. The remand statutes should not be read to preclude the remand of cases not identified in the statutes, since those statutes do not provide an exclusive list of circumstances when district court judges can remand.[230] In addition, Congress itself approved extra-statutory remands when it approved pendent claim remand. In any event, courts deciding to remand for other reasons can consider whether the purposes of the statutory removal and remand provisions are furthered or thwarted by the creation of nonstatutory remand authority in the particular case, with ultimate review of their determinations by the Supreme Court and Congress.

Dean M. Lenzotti

227. *See supra* notes 70–78 and accompanying text.
228. Steinman, *supra* note 37, at 957.
229. *See supra* note 56 and accompanying text.
230. *See supra* notes 85–90 and accompanying text.